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 JAMES MASER, MAIZ HOLDING COMPANY, dba PICANTE COCINA
 RESTAURANT, on Behalf of Themselves and All Others Similarly
 Situated

UNITED STATES DISTRICT COURT
 NORTHERN DISTRICT OF CALIFORNIA
 SAN FRANCISCO DIVISION

SHERI L. KENDALL, dba BALA HAIR) Case No. c 04 4276 EDL
 SALON, JAMES MASER, MAIZ)
 HOLDING COMPANY, dba PICANTE) **CLASS ACTION ANTITRUST**
 COCINA RESTAURANT, on Behalf of) **COMPLAINT AND DEMAND**
 Themselves and All Others) **FOR JURY TRIAL**
 Similarly Situated,)

CLASS ACTION

Plaintiffs,

vs.

VISA U.S.A. INC., MASTERCARD
 INTERNATIONAL, INC., BANK OF
 AMERICA, N.A., a subsidiary of
 BANK OF AMERICA CORPORATION,
 WELLS FARGO BANK, N.A., a
 subsidiary of WELLS FARGO &
 COMPANY, U.S. BANK, N.A, a
 subsidiary of U.S. BANCORP,

Defendants.

1 Plaintiffs SHERI L. KENDALL, dba BALA HAIR SALON, and JAMES
2 MASER, MAIZ HOLDING COMPANY, dba PICANTE COCINA RESTAURANT aver
3 for their complaint against VISA U.S.A. INC. ("VISA") and
4 MASTERCARD INTERNATIONAL, INC. ("MASTERCARD"), BANK OF AMERICA,
5 N.A., a subsidiary of BANK OF AMERICA CORPORATION, WELLS FARGO
6 BANK, N.A., a subsidiary of WELLS FARGO & COMPANY, U.S. BANK,
7 N.A, a subsidiary of U.S. BANCORP, upon knowledge with respect
8 to their own acts and upon information and belief with respect
9 to all other matters, as follows:
10
11

12 JURISDICTION

13 1. Jurisdiction and venue of this action is under 15
14 U.S.C. §§ 15(a) and 26.

15 2. Defendants or their agents inhabit or are found or
16 reside in the Northern District of California.

17 3. VISA and MASTERCARD each operate as joint ventures that
18 are created, owned and governed by their thousands of members
19 which are primarily banks, including the Defendant banks. VISA
20 and MASTERCARD are engaged in interstate commerce and are doing
21 business and are present in the Northern District of California.
22 Venue of this action against VISA and MASTERCARD, and Defendant
23 banks and all other bank members of VISA and MASTERCARD, is
24 proper in this court.
25

26 INTRADISTRICT ASSIGNMENT

27 4. The basis for assignment to the San Francisco Division
28 is that a substantial part of the events which give rise to the

1 claims of the named Plaintiff occurred in San Francisco, Sonoma
2 and Alameda Counties.

3
4 PARTIES

5 5. Plaintiff SHERI L. KENDALL, dba BALA HAIR SALON
6 ("BALA") is a resident of Sonoma County and is licensed to do
7 business and does business as a beauty salon in Sonoma County.
8 BALA presently has VISA and MASTERCARD contracts with one or
9 more Defendant banks, or their co-conspirators, and have "sold"
10 (deposited) VISA and MASTERCARD credit and debit receipts, or
11 electronic equivalents, to one or more Defendant banks, or their
12 co-conspirators, for deposit in their commercial demand deposit
13 bank accounts.
14

15 6. Plaintiff JAMES MASER, MAIZ HOLDING COMPANY, a
16 California Corporation, dba PICANTE COCINA RESTAURANT
17 ("PICANTE") is a resident of Alameda County and is licensed to
18 do business and does business as a restaurant in Alameda County.
19 PICANTE presently has VISA and MASTERCARD contracts with one or
20 more Defendant banks, or their co-conspirators, and have "sold"
21 (deposited) VISA and MASTERCARD credit and debit receipts, or
22 electronic equivalents, to one or more Defendant banks, or their
23 co-conspirators, for deposit in their commercial demand deposit
24 bank accounts.
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1 7. VISA and MASTERCARD are bank card associations whose
2 members include Defendant banks, other bank members, regional
3 banking associations, and other financial institutions.

4 8. Defendant WELLS FARGO BANK N.A., a subsidiary of WELLS
5 FARGO & COMPANY ("WELLS FARGO") is a nationally chartered bank
6 with offices in the Northern District of California. It engages
7 in interstate commerce. It participates in the management of
8 and has a proprietary interest in VISA and MASTERCARD. It is an
9 "acquiring bank" in that throughout California it acquires from
10 Plaintiff or other retailers and class members VISA and
11 MASTERCARD credit and debit receipts, or electronic equivalents,
12 for deposit in their commercial demand deposit bank account at
13 the face amount less a fee. Normally WELLS FARGO and other
14 member banks of VISA and MASTERCARD do not charge a fee when
15 they buy (accept) checks from their retail customers for deposit
16 in the bank customer's commercial account.

17 9. Defendant BANK OF AMERICA, N.A., a subsidiary of BANK
18 OF AMERICA CORPORATION ("BANK OF AMERICA") is a nationally
19 chartered bank with offices in the Northern District of
20 California. It engages in interstate commerce. It participates
21 in the management of and has a proprietary interest in VISA and
22 MASTERCARD. It is an "acquiring bank" in that throughout
23 California it acquires from Plaintiff or other retailers and
24 class members VISA and MASTERCARD credit and debit receipts, or
25 electronic equivalents, for deposit in their commercial demand
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1 deposit bank account at the face amount less a fee. Normally
2 BANK OF AMERICA and other member banks of VISA and MASTERCARD do
3 not charge a fee when they buy (accept) checks from their retail
4 customers for deposit in the bank customer's commercial account.

5 10. Defendant U.S. BANK, N.A, a subsidiary of U.S. BANCORP
6 ("US BANK") is a nationally chartered bank doing business in the
7 Northern District of California. It engages in interstate
8 commerce. It participates in the management of and has a
9 proprietary interest in VISA and MASTERCARD. It is an
10 "acquiring bank" in that throughout California it acquires from
11 Plaintiff or other retailers and class members VISA and
12 MASTERCARD credit and debit receipts, or electronic equivalents,
13 for deposit in their commercial demand deposit bank account at
14 the face amount less a fee. Normally US BANK and other member
15 banks of VISA and MASTERCARD do not charge a fee when they buy
16 (accept) checks from their retail customers for deposit in the
17 bank customer's commercial account.

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20 CO-CONSPIRATORS

21 11. Defendants' co-conspirators include at least all banks
22 and other financial institutions doing business in the United
23 States, engage in interstate commerce, and have a management and
24 proprietary interest in VISA and/or MASTERCARD. Each is an
25 "acquiring bank" in that it acquires from Plaintiff or other
26 retailers and class members VISA and/or MASTERCARD credit and
27 debit receipts, or electronic equivalents, for deposit in their
28

1 commercial demand deposit bank account at the face amount less a
2 fee. The co-conspirators also include Third Party Processors
3 ("TTPs") who process for merchants VISA and/or MASTERCARD credit
4 and debit receipts, or electronic equivalents, for deposit in
5 the merchants' demand deposit accounts in banks. Normally each
6 co-conspirator and other member banks of VISA and/or MASTERCARD
7 do not charge a fee when they buy (accept) checks from their
8 retail customers for deposit in the bank customer's commercial
9 account.
10

11 CLASS

12 12. Plaintiffs represent the class of all persons and
13 business entities in the United States who are retailers,
14 businesses, professions and merchants, including those "on-
15 line", and presently have VISA and/or MASTERCARD merchant
16 contracts with one or more member banks of Defendants VISA
17 and/or MASTERCARD and/or a TTP pursuant to which they have
18 "sold" (deposited) VISA and MASTERCARD credit or debit receipts,
19 or electronic equivalents, to one or more member banks for
20 deposit in their commercial demand deposit bank account and have
21 thereby incurred VISA and/or MASTERCARD merchant discount or
22 interchange fees. Plaintiffs BALA and PICANTE do not contest in
23 this action, as averred in other litigation, any tying
24 arrangement, of the VISA and MASTERCARD debit charges with other
25 charges. The class does not include the named Defendants, their
26 co-conspirators, their directors, officers, or members of their
27
28

1 families, or those merchants who negotiate merchant discounts
2 directly with VISA and/or MASTERCARD.

3 13. VISA and/or MASTERCARD merchant discount or
4 interchange fees have harmed and continue to harm the interests
5 of retailers, businesses, professions and merchants, including
6 those "on-line", throughout the United States. The members of
7 the class are so numerous that joinder of all members is
8 impracticable.
9

10 14. Defendants' relationships with the class members and
11 Defendants' practice of assessing VISA and/or MASTERCARD
12 merchant discount or interchange fees with respect to class
13 members have been substantially uniform. Questions of law and
14 fact will predominately be common to the class.
15

16 15. The named Plaintiffs have no conflict of interest with
17 class members and have retained counsel competent and
18 experienced in federal and state antitrust litigation. The
19 named Plaintiffs and their counsel will fairly and adequately
20 represent the interests of the class.

21 16. Defendants have acted, continue to act, refused to act
22 and continue to refuse to act on grounds generally applicable to
23 the class, thereby making appropriate damages and injunctive
24 relief with respect to the class as a whole.
25

26 17. This action is superior to any other method for the
27 fair and efficient adjudication of this legal dispute, as
28 joinder of all members is not only impracticable, but

1 impossible. The damages suffered by certain members of the
2 class are small in relation to the expense and burden of
3 individual litigation and therefore it is highly impractical for
4 such class members, individually, to attempt redress of the VISA
5 and/or MASTERCARD merchant discount or interchange fees and to
6 enjoin price fixing. There will be no extraordinary difficulty
7 in the management of this class action. Common questions of law
8 and fact exist with respect to all class members and predominate
9 over any questions solely affecting individual members. Among
10 the questions of law and fact common to the class, many of which
11 cannot be seriously disputed, are the following:

12
13 (a) whether the VISA and/or MASTERCARD merchant discount or
14 interchange fee fixed by VISA and MASTERCARD is a sharing of
15 revenue by competitors, a compensation vehicle among
16 competitors, and is not established by free competition.

17
18 (b) whether the VISA and/or MASTERCARD merchant discount or
19 interchange fee provides the floor or establishes a range for
20 the merchant discount fee levied against the merchants.

21 (c) whether the VISA and/or MASTERCARD merchant discount or
22 interchange fee is set by VISA and MASTERCARD at a
23 supracompetitive level.

24 RELEVANT MARKET

25
26 18. The relevant product market is acquisition of receipts
27 from general purpose credit and debit cards, or electronic
28 equivalents, for deposit in commercial bank accounts.

19. The relevant geographic market is the United States.

FIRST CLAIM FOR RELIEF
DAMAGES FOR VIOLATIONS OF SECTION ONE
OF THE SHERMAN ACT AGAINST
VISA, MASTERCARD, BANK OF AMERICA, WELLS FARGO, US BANK

20. Plaintiffs BALA and PICANTE reaver each and every averment in paragraphs 1 through 19 as if fully set forth herein.

21. VISA and MASTERCARD each is a combination of banks which are in competition with each other, directly or indirectly, which as such combination:

- (a) Sets an "interchange fee" to be paid by an acquiring bank to the institution which issued the VISA or MASTERCARD card. The merchant discount fees, established by VISA and MASTERCARD, are based largely on the interchange fees. Pursuant to these agreements the interchange fee sets a floor under the merchant discount fee, whether merchant deposits are processed directly by member banks or TTPs. The separate decisions of VISA and MASTERCARD, as to the floors for the merchant discounts, are horizontal restraints on competition. These merchant discounts are not established by free competition, nor would they be absorbed by merchants and Plaintiffs BALA and PICANTE in a competitive system, e.g. checks.

1 (b) In addition to providing authorization and clearing
2 house (settlement) services to member banks and their
3 agents, VISA and MASTERCARD each provides joint
4 marketing services, in that each directly negotiates
5 the merchant discounts for the bank of deposit with
6 only selected merchants, which services could be
7 adequately performed by member banks, TTPs, and agent
8 banks alone and in competition with each other. In a
9 competitive system, banks and TTPs would be offering
10 at least such lower merchant discounts to Plaintiffs
11 BALA and PICANTE and other merchants.
12

13 22. Plaintiffs BALA and PICANTE, and all others similarly
14 situated, must pay a merchant discount fee upon the deposit of
15 VISA and MASTERCARD credits and debits, whereas the deposit of
16 checks, which entails more processing, is without such fee to
17 the depositor. Increases by VISA and MASTERCARD of the
18 interchange fees have resulted in increases in merchant discount
19 fees.
20
21

22 23. Plaintiffs BALA and PICANTE, and all others similarly
23 situated, have a dilemma where each merchant must individually
24 choose to accept VISA and MASTERCARD in order to meet the
25 competition; however all are worse off as a result due to the
26 expense of the merchant discount fee.
27

28 24. VISA and MASTERCARD and Defendant banks and all other
member banks of VISA and MASTERCARD obtain supracompetitive

1 profits by the assessment of merchant discount fees on the
2 deposits of Plaintiffs BALA and PICANTE, and all others
3 similarly situated.

4 25. Member banks were prohibited from issuing the Discover
5 Card, which charges merchants about 30% less than VISA and
6 MASTERCARD.

7
8 26. On August 28, 2002, VISA announced that it would not
9 permit new "Private Arrangements" by which member banks, but not
10 merchants, could opt out of the VISA interchange system.
11 Neither before nor after this event could Plaintiffs BALA and
12 PICANTE avoid the fixed merchant discount fee, because member
13 banks of both VISA and MASTERCARD find it economically to their
14 advantage not to opt out of systems which establish a non-
15 competitive merchant discount.

16
17 27. Both VISA and MASTERCARD raised interchange fees
18 charged to merchants a number of times without losing a single
19 customer as a result.

20
21 28. Both VISA and MASTERCARD charge differing interchange
22 fees to merchants based, in part, on the degree to which a given
23 merchant category needs to accept general purpose cards.

24 29. The reality is that VISA and MASTERCARD are able to
25 charge substantially different prices for those hundreds of
26 thousands of merchants who must take credit and debit cards at
27 any price because their customers insist on using those cards.
28

1 30. Plaintiffs BALA and PICANTE and all others similarly
2 situated have been damaged by the payment of merchant discounts,
3 in as yet an undetermined total amount, which total amount
4 should be trebled. Plaintiffs BALA and PICANTE do not contest
5 in this action, as averred in other litigation, any tying
6 arrangement, of the VISA and MASTERCARD debit charges with other
7 charges.
8

9 **SECOND CLAIM FOR RELIEF**

10 **15 U.S.C. §26, SECTION 16 OF THE CLAYTON ACT AGAINST**
11 **VISA, MASTERCARD, BANK OF AMERICA, WELLS FARGO AND US BANK**

12 30. Plaintiffs BALA and PICANTE reaver all the preceding
13 paragraphs as if set forth in this claim.

14 31. This claim is brought under Section 16 of the Clayton
15 Act, 15 U.S.C. § 26.

16 32. Plaintiffs BALA and PICANTE and all those similarly
17 situated seek against VISA, MASTERCARD, Defendant banks, member
18 banks, and their co-conspirators that this Court order:

19 (a) Defendants to cease and desist from setting the
20 interchange fee and merchant discount fee at
21 supracompetitive levels.

22 (b) The elimination from VISA and MASTERCARD of all joint
23 marketing activities.
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PRAYER FOR RELIEF

WHEREFORE, Plaintiffs BALA and PICANTE respectfully demand:

1. That the Court declare, adjudge and decree that Defendants have committed the violations of federal law alleged herein.
2. That the Court enter an order pursuant to Rule 23 of the Federal Rules of Civil Procedure permitting this action to be maintained as a class action on behalf of the class specified herein.
3. That the court award damages sustained by the Plaintiffs BALA and PICANTE, and members of the class, on the First Claim for Relief, in an amount to be proved at trial, to be trebled according to law, plus interest, including prejudgment interest, reasonable attorney's fees and costs of suit, and such other and further relief as this Court may deem just and proper.
4. That the Court order:
 - (a) That Defendants cease and desist from setting the interchange fee and the merchant discount fee.
 - (b) The elimination from VISA and MASTERCARD of all joint marketing activities.
5. That Plaintiffs BALA and PICANTE be awarded their costs of suit including reasonable attorney's fees.

1 Plaintiffs BALA and PICANTE hereby demand trial by jury of
2 all issues properly triable thereby.

3 Dated: October 7, 2004

4 Attorneys of record for
5 Plaintiffs SHERI L. KENDALL,
6 dba BALA HAIR SALON, JAMES
7 MASER, MAIZ HOLDING COMPANY,
8 dba PICANTE COCINA RESTAURANT,
on Behalf of Themselves and All
Others Similarly Situated

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10 By: _____
11 RICHARD J. ARCHER, ESQ.
12 ARCHER & HANSON

13
14 By: _____
15 JAMES A. KOPCKE
16 GOLDEN • KOPCKE, LLP

17 **CERTIFICATION OF INTERESTED ENTITIES OR PERSONS**

18
19 Pursuant to Civil L.R. 3-16, the undersigned certifies that
20 of this date, other than the named plaintiffs and the class of
21 all those in the United States with a commercial demand deposit
22 bank account and the named defendants and each member bank, each
23 member regional banking association, and each other financial
24 institution that is a member of and has a proprietary interest
25 in VISA or MASTERCARD, there is no such interest to report.
26

27 By: _____
28 JAMES A. KOPCKE
Attorney of record for Plaintiffs

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